Macsteel International Far East Ltd v Lysaght Corrugated Pipe Sdn Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-2002–10 of 2021, W-02(IM)(NCC)-2003–10 OF 2021 AND W-02(IM)(NCC)-2004–10 OF 2021

LEE SWEE SENG, HADHARIAH SYED ISMAIL JJCA AND LIM CHONG FONG J

24 MAY 2023

Arbitration — Stay of proceedings — Application — Dispute over existence of arbitration agreement — High Court dismissed appellant's application to stay court's proceedings pending arbitration — High Court granted anti-arbitration injunction — Appropriate forum — Whether High Court or arbitral tribunal had jurisdiction and power to investigate and conclude validity of arbitration agreement — Whether judicial commissioner erred in refusing stay application and in granting anti-arbitration injunction — Arbitration Act 2005 ss 10(1), 18(1) & (2)

The present appeals were filed by the appellant against the High Court's refusal to grant a stay of proceedings and to refer the parties to arbitration pursuant to s 10 of the Arbitration Act 2005 ('the AA') as well as the consequential grant of an anti-arbitration injunction to restrain the parties from continuing the arbitration proceedings commenced at the Hong Kong International Arbitration Centre. The dispute between the parties emanated from an alleged overdue unpaid payment for hot rolled coils supplied by the appellant to the respondents pursuant to several supply contracts between the parties. The respondents denied the existence of the supply contracts and claimed that the documents produced by the appellant were forged because the respondents had only dealt with a company known as Popeye Resources Sdn Bhd ('PR') in respect of the purchase of the imported hot rolled coils. In refusing the appellant's stay application, the learned judicial commissioner ('the JC') held that whilst he should be slow to interfere with the jurisdiction of the arbitral tribunal, it did not mean that he should readily grant a stay application under s 10 of the AA when the existence of the arbitration agreement itself was in question without evaluating the facts and evidence for himself based on the full merits approach. The JC therefore opted for the second option (ie, to give directions for the trial by the court of the issue) in the guidelines provided by the court in the English case of *Nigel Peter Albon v Naza Motor Trading Sdn Bhd* [2007] 2 All ER 1075 ('Peter Albon'). In the present appeals, the appellant urged the court to adopt the approach taken in the Singapore case of *Malini Ventura v Knight Capital* [2015] 5 SLR 707 and to embark on the third option in the guidelines prescribed in *Peter Albon* (ie, to stay the proceedings on the

basis that the arbitrator would decide the issue). A

Held, dismissing the appeals with costs of RM5,000 for each of the appeals subject to allocator and remitting the proceedings to the High Court to be heard before another judge:

B

(1) Based on the available options in the guidelines prescribed in Peter Albon, the court acknowledged that the determination on whether there was a concluded arbitration agreement that was not null and void could not be meaningfully made based on the existing affidavit evidence before the court to invoke the first option or fourth option in the said guidelines. There was the necessity for further investigation here. This may be made by the High Court pursuant to the second option premised upon s 10(1) of the AA or by the arbitral tribunal pursuant to the third option premised upon s 18(1) and (2) of the AA. In other words, both the High Court and the arbitral tribunal were forums that had jurisdiction and power to investigate and conclude the validity of the arbitration agreement. In this situation, the court proffered a flexible approach that the appropriate forum must be the forum that was on balance more just and convenient having regard to the facts and circumstances in issue (see paras 33–34). C D E

(2) It was plain and obvious to the court that the investigation ought to be carried out in Malaysia because of the specific fact that the impugned supply contracts emanated from Malaysia probably via the participation of PR which was based in Malaysia. If the investigation was to be undertaken by the High Court, there was the availability of the power to compel PR's attendance via subpoena which was unavailable to the Hong Kong-based arbitration. The court found in consequence that it was also necessary to preserve the status quo pending the investigation, as such, the anti-arbitration injunction (which would not cause any injustice to the appellants because any delay in commencing the arbitration could be compensated in interest and/or costs) was warranted. Based on the above findings, the JC had not made a serious error in his exercise of discretion in refusing the stay application and in granting the anti-arbitration injunction where no court confronted with the facts and relevant factors before it would have decided differently (see paras 35 & 37–39). F G H

[Bahasa Malaysia summary

Rayuan-rayuan semasa telah difailkan oleh perayu terhadap keengganan Mahkamah Tinggi untuk memberikan penangguhan prosiding dan merujuk pihak-pihak kepada timbang tara menurut s 10 Akta Timbang Tara 2005 ('AT') serta pemberian berbangkit injunksi anti-timbang tara untuk menghalang pihak-pihak daripada meneruskan prosiding timbang tara yang dimulakan di Pusat Timbang Tara Antarabangsa Hong Kong. Pertikaian antara pihak-pihak berpunca daripada bayaran tertunggak yang dikatakan belum I

A dibayar bagi gegelung gelek panas yang dibekalkan oleh perayu kepada responden-responden berdasarkan beberapa kontrak pembekalan antara pihak-pihak. Responden-responden menafikan kewujudan kontrak-kontrak pembekalan tersebut dan mendakwa bahawa dokumen-dokumen yang dikemukakan oleh perayu adalah palsu kerana responden-responden hanya
B berurusan dengan syarikat yang dikenali sebagai Popeye Resources Sdn Bhd ('PR') berhubung pembelian gegelung gelek panas yang diimport. Dalam menolak permohonan penangguhan perayu, pesuruhjaya kehakiman yang bijaksana ('PK') berpendapat bahawa walaupun dia tidak perlu tergesa-gesa untuk campur tangan dengan bidang kuasa tribunal timbang tara, ia tidak
C bermakna bahawa dia harus sedia memberikan permohonan penangguhan di bawah s 10 AT apabila kewujudan perjanjian timbang tara itu sendiri dipersoalkan tanpa menilai sendiri fakta dan keterangan berdasarkan pendekatan merit penuh. Oleh itu PK memilih pilihan kedua (iaitu, untuk memberi arahan untuk perbicaraan oleh mahkamah bagi isu tersebut) dalam
D garis panduan yang disediakan oleh mahkamah dalam kes Inggeris *Nigel Peter Albon v Naza Motor Trading Sdn Bhd* [2007] 2 All ER 1075 ('Peter Albon'). Dalam rayuan semasa, perayu menggesa mahkamah untuk menerima pakai pendekatan yang diambil dalam kes Singapura *Malini Ventura v Knight Capital* [2015] 5 SLR 707 dan untuk melaksanakan pilihan ketiga dalam garis
E panduan yang ditetapkan dalam Peter Albon (iaitu, untuk menangguhkan prosiding atas dasar bahawa penimbang tara akan memutuskan isu tersebut).

Diputuskan, menolak rayuan-rayuan dengan kos sebanyak RM5,000 bagi setiap rayuan tertakluk kepada alokatur dan mengembalikan perbicaraan
F kepada Mahkamah Tinggi untuk didengar di hadapan hakim berbeza:

(1) Berdasarkan pilihan yang ada dalam garis panduan yang ditetapkan dalam Peter Albon, mahkamah mengakui bahawa penentuan sama ada terdapat perjanjian timbang tara yang dimuktamadkan yang tidak batal
G dan sah tidak boleh dibuat secara bermakna berdasarkan keterangan afidavit sedia ada di hadapan mahkamah untuk mahkamah menggunakan pilihan pertama atau pilihan keempat dalam garis panduan tersebut. Terdapat keperluan untuk siasatan lanjut di sini. Ini boleh dibuat oleh Mahkamah Tinggi menurut pilihan kedua berdasarkan
H s 10(1) AT atau oleh tribunal timbang tara menurut pilihan ketiga berdasarkan s 18(1) dan (2) AT. Dalam erti kata lain, kedua-dua Mahkamah Tinggi dan tribunal timbang tara adalah forum yang mempunyai bidang kuasa dan kuasa untuk menyiasat dan membuat kesimpulan mengenai keabsahan perjanjian timbang tara tersebut.
I Dalam situasi ini, mahkamah menawarkan pendekatan yang fleksibel bahawa forum yang sesuai mestilah forum yang mana berdasarkan imbangan ianya lebih adil dan mudah dengan mengambil kira fakta dan keadaan dalam isu (lihat perenggan 33–34).

(2) Adalah terang dan jelas kepada mahkamah bahawa penyiasatan tersebut

perlu dijalankan di Malaysia kerana fakta khusus bahawa kontrak pembekalan yang disangkal tersebut berasal dari Malaysia mungkin melalui penyertaan PR yang berpangkalan di Malaysia. Sekiranya penyiasatan tersebut dijalankan oleh Mahkamah Tinggi, terdapat ketersediaan kuasa untuk memaksa PR hadir melalui sepina yang tidak tersedia untuk timbang tara yang berpangkalan di Hong Kong. Mahkamah mendapati bahawa kesannya adalah terdapat keperluan untuk mengekalkan status quo sementara menunggu penyiasatan tersebut, oleh itu, injunksi anti-timbang tara (yang tidak akan menyebabkan apa-apa ketidakadilan kepada perayu kerana apa-apa kelewatan dalam memulakan timbang tara boleh diberi pampasan dalam bentuk faedah dan /atau kos) adalah diperlukan. Berdasarkan penemuan-penemuan di atas, PK tidak membuat kesilapan yang serius dalam melaksanakan budi bicaranya dalam menolak permohonan penangguhan dan dalam memberikan injunksi anti-timbangtara di mana tiada mahkamah berhadapan dengan fakta dan faktor yang berkaitan di hadapannya akan memutuskan secara berbeza (lihat perenggan 35 & 37–39).]

Cases referred to

Claxton Engineeering Services Ltd v TXM Olaj-es Gazkutato Kft (No 2) [2011] EWHC 345 (Comm), KBD (refd)
Dell Computer Corp v Union des consommateurs [2007] SCJ No 34, SC (refd)
Iskandar Coast SDN BHD v Ketua Pengarah Hasil Dalam Negeri [2019] MLJU 429; [2019] 7 CLJ 143, CA (refd)
Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd [2019] 5 MLJ 1, FC (refd)
Malini Ventura v Knight Capital Pte Ltd and others [2015] 5 SLR 707, HC (distd)
Nigel Peter Albon v Naza Motor Trading Sdn Bhd [2007] 2 All ER 1075, Ch D (refd)
Tomolugen Holdings Ltd v Silica Investors Ltd [2016] 1 SLR 373, CA (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150, FC (refd)

Legislation referred to

Arbitration Act 2005 ss 10, 10(1), (4), 18, 18(1), (2)
Penal Code s 463

Appeal from: *Lysaght Corrugated Pipe Sdn Bhd & Anor v Popeye Resources Sdn Bhd & Anor* [2022] MLJU 165 (High Court, Kuala Lumpur)

Oon Thian Seng (with Leong Phing Ai) (TS Oon & Partners) for the appellant.
Cindy Goh Joo Seong (Loh Heng Yeong) (Chooi & Company + Cheang & Ariff) for the respondents.

Lim Chong Fong J:

INTRODUCTION

[1] These are related appeals against the High Court's refusal to grant a stay of the proceedings and refer the parties to arbitration pursuant to s 10 of the Arbitration Act 2005 ('the AA') as well as consequential grant of an anti-arbitration injunction to restrain the parties from continuing the arbitration proceedings commenced at the Hong Kong International Arbitration Centre.

[2] We heard the appeals on 15 August 2022 and thereafter dismissed them with costs of RM5,000 for each of the appeals subject to allocator and the proceedings be remitted back to the High Court to be heard before another judge.

[3] The parties will hereinafter be referred by their names.

BACKGROUND

[4] By various supply contracts made in 2019 and 2020 between Lysaght Corrugated Pipes Sdn Bhd ('LCP') as well as Lysaght Galvanized Steel Bhd ('LGS') and Popeye Resources Sdn Bhd ('PR'), both LCP and LGS purchased from PR imported hot rolled coils produced by Macsteel International Far East Ltd ('MIFE').

[5] In total, LCP from March 2019 to February 2020 entered into 11 duly executed written supply contracts and LGS from January 2019 to February 2020 entered into nine duly executed written supply contracts with PR respectively. The hot rolled coils were received by LCP and LGS and both of them made payments amounting to RM14,718,510 and RM10,522,675 to PR respectively.

[6] However, both LCP and LGS in September 2020 received an email from MIFE for overdue unpaid payment for hot rolled coils supplied in respect of several supply contracts amounting to USD1,151,630.84 and amounting USD1,555,656.12 respectively.

[7] According to MIFE, there were allegedly five duly executed written supply contracts entered into from October 2019 and February 2020 between LCP and MIFE and three duly executed written supply contracts entered into from January 2020 to February 2020 between LGS and MIFE. These supply contracts contained an arbitration clause for disputes to be resolved under the auspices of the Hong Kong International arbitration Centre.

[8] MIFE accordingly produced copies of these supply contracts to both LCP and LGS as well as letters from them requesting for an extension of time to delay shipment of the goods and payment and authorisation letter to forward shipping documents to PR.

[9] Both LCP and LGS impugned these alleged supply contracts and claimed the documents produced by MIFE were forged because they only dealt with PR in respect of the purchase of the imported hot rolled coils. Consequently, they lodged their respective police reports in September 2020.

[10] MIFE however retorted that there were previously also 14 similar supply contracts made between LCP/LGS and MIFE which were completed and all paid on a timely manner without any incident. In those supply contracts, PR acted as the intermediary agent of LCP and LGS including arranging for the supply contracts to be executed by LCP and LGS respectively. For all these supply contracts, PR received payment from LCP and LGS in Ringgit Malaysia and remitted payment to MIFE in US Dollars.

[11] As the result, MIFE on 15 December 2020 commenced arbitration proceedings against both LCP and LGS in Hong Kong to recover the alleged unpaid payments ('arbitration').

[12] LCP and LGS in consequence on 14 March 2021 initiated Kuala Lumpur High Court Suit No WA-22NCC-109–03 of 2021 against both PR and MIFE ('suit'). In the suit, LCP and LGS sought for the following reliefs:

> 57.1. A declaration that the Contracts No 168758, 168298 and 168803 were forged and/or fraudulently prepared;
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> 57.2. A declaration that the Contracts No 168758, 168298 and 168803 are null and void and/or cancelled;
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> 57.3. A declaration that two (2) letters dated 17.03.2020 and one (1) letter dated 29.04.2020 were forged and/or are fraudulent in nature and are null and void;
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> 57.4. A declaration that the purported authorisation letter dated 10.6.2020 were forged and/or are fraudulent in nature and are null and void;
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> 57.5. A permanent injunction prohibiting, preventing and/or restraining the Second Defendant whether acting by itself, its directors, officers, employees, servants or agents or any of them howsoever from taking any action against the Second Plaintiff in relation to the Contracts No 168758, 168298 and 168803 including proceeding with the arbitration proceedings commenced by the Second Defendant against the Second Plaintiff on 15.12.2020;
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> 57.6. Further and/or in the alternative, a permanent injunction prohibiting, preventing and/or restraining the Second Defendant whether acting by itself, its directors, officers, employees, servants or agents or any of them howsoever from taking any action against the Second Plaintiff for the registration and/or enforcement of any arbitral award;

57.7. General damages to be assessed;

57.8. Exemplary damages and/or aggravated damages to be assessed;

57.9 Interest at the rate of 5% per annum on all damages awarded by this Honourable Court from the date of judgment until the date of full and final settlement;

57.10 Costs of this action; and

57.11 Such further or other reliefs that this Honourable Court deems fit.

IN THE HIGH COURT

[13] PR did not enter appearance in the suit.

[14] After entering appearance, MIFE filed a notice of application to stay the proceedings in the suit pursuant to s 10 of the AA ('stay application').

[15] Both LCP and LGS filed their respective notices of application to injunct the continuation of the arbitration ('anti-arbitration injunction applications').

[16] The learned judicial commissioner heard the stay application and anti-arbitration injunction applications together.

[17] In respect of the stay application, the parties advanced rival contentions supported by foreign case authority. MIFE relied on the Singapore cases of *Malini Ventura v Knight Capital Pte Ltd and others* [2015] 5 SLR 707 and *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 as well as the Canadian case of *Dell Computer Corp v Union des consommateurs* [2007] SCJ No 34 to justify immediate stay of the court proceedings for the parties to refer and continue with the arbitration whilst LCP and LCS relied on the English case of *Nigel Peter Albon v Naza Motor Trading Sdn Bhd* [2007] 2 All ER 1075 to oppose the same.

[18] The learned judicial commissioner preferred and adopted the full merits approach set out in Peter Albon based on the available evidence rather than the cursory prima facie approach set out in *Malini Ventura* to determine whether the arbitration agreement was properly concluded and hence ultimately decide whether the court proceedings should be stayed. He focused on the following dicta of Lightman J in *Peter Albon* with emphasis added:

> [16] Guidelines were laid down by Judge Humphrey Lloyd QC in *Birse Construction Ltd v St David Ltd* [1999] BLR 194; [1999]) 70 Con LR 10) and again by the Court of Appeal in the later case of *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Services Inc* [2000] 70 Con LR 21. These *guidelines* are to the effect that on an application for a stay such as the present *where*

the conclusion of the arbitration agreement is in issue, there are *four options open to the court: (1) (where it is possible to do so) to decide the issue on the available evidence presently before the court that the arbitration agreement was made and grant the stay (2) to give directions for the trial by the court of the issue (3) to stay the proceedings on the basis that the arbitrator will decide the issue; and (4) (where it is possible to do so) to decide the issue on the available evidence that the arbitration agreement was not made and dismiss the application for the stay*. The Court of Appeal adopted the second of these options. The guidelines and the decision of the Court of Appeal establish that on an application under s 9(1) of the 1996 Act the court can try and (subject to one qualification) should decide the issue whether the arbitration agreement was concluded. The minor qualification in respect of which the guidelines are not in accord with the construction which I have adopted is in respect of the third of the guidelines. *Where there is an issue which the court cannot resolve on the available evidence on the application as to whether the arbitration agreement was concluded, the court indeed can stay the proceedings so that the arbitrators can decide the issue, but only by exercising its inherent jurisdiction and not by exercising any jurisdiction under s 9*. Support for this view may be found in a passage in the *Al Naimi* case ([2000] 70 Con LR 21 at p 30).

...

[20] I would answer the first and second submissions as follows. Whilst the *doctrine of 'Kompetenz-Kompetenz'* (which is given effect in a domestic arbitration by s 30 of the 1996 Act) provides that the arbitral tribunal shall have jurisdiction to determine whether the arbitration agreement was ever concluded, *it does not preclude the court itself from determining that question.* There are *two reasons* why the court must have jurisdiction to rule on whether the arbitration agreement was concluded. The first is that the rule of law in general and subject only to limited exceptions requires that *a party should not be barred from access to the court for the resolution of disputes* unless the grounds for such bar are established. A bar on the ground of *the alleged conclusion of an arbitration agreement* (in general and subject only to limited exceptions) *is not established unless and until the court has ruled on the issue whether it has been concluded. The second is that, unless and until it is held that the arbitration agreement has been concluded*, the compelling factors requiring respect for the terms agreed regarding arbitration do not come into play or at any rate do not come into play with their full force and effect.

[19] Consequently, the learned judicial commissioner decided that whilst he should be slow to interfere with the jurisdiction of the arbitral tribunal, it did not mean that he should readily grant a s 10 of the AA stay application when the existence of the arbitration agreement itself is in question without evaluating the facts and evidence for himself based on the full merits approach. He emphasised that if there is no arbitration agreement in existence, then there can be no reason for the arbitration.

[20] In this respect, the learned judicial commissioner summarised the facts adduced via affidavit evidence before him as follows:

A (a) the impugned supply contracts were not electronically signed and the signatures were physically made;

(b) MIFE does not have the original signed impugned supply contracts;

(c) the impugned supply contracts were given to MIFE by PR;

B (d) basic visual comparison shows that there is a difference between the signatures in the impugned supply contracts with the LCP/LGS's representatives' specimen signatures;

C (e) there were no invoices or claims made directly by MIFE to the LCP and LGS regarding the impugned supply contracts until recently when the dispute arose in this case.

(f) there are no correspondences directly between MIFE regarding the impugned supply contracts or payment of the 14 completed supply D contracts prior to the dispute in this case arose;

(g) there were no correspondences containing direct orders or instructions given by LCP/LGS to MIFE;

E (h) MIFE dealt with PR and not LCP/LGS in respect of the impugned supply contracts;

(i) MIFE only received payments from PR in respect of the impugned supply contracts and 14 completed supply contracts;

F (j) LCP and LGS never made any payment to MIFE;

(k) the payments terms in the impugned supply contracts were in US Dollars whereas the payment terms in the LCP-PR supply contracts and LGS-PR supply contracts were in Ringgit Malaysia; and

G (l) there were no documents which conclusively or clearly show that PR was an agent of LCP and LGS.

[21] The learned judicial commissioner therefore, in the circumstances, came to the view MIFE only had circumstantial but not direct evidence that H the impugned supply contracts were not forged. This is insufficient to conclude at this stage that there is a valid arbitration agreement in existence between the parties; hence he directed this issue be tried based on the second option in the guidelines prescribed in Peter Albon.

I **[22]** The reasoning in justification of the stance he adopted are as follows with emphasis added:

> [79] It cannot be denied that the arbitration agreement is the cornerstone of a stay application under s 10 of the AA 2005. It is fundamental.
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> [80] In fact, further to para 73 of this judgment, in the context of a Section 10(1) of

the AA 2005 stay application, I find the following passages from the decision of Lightman J in Albon regarding his interpretation of ss 9(1) and 9(4) of the English Arbitration Act 1996 to be very elucidating:

> [18] My construction of s 9(1) is entirely in accord with s 9(4) and (again subject only to minor qualifications) with the authorities on that section. *Section 9(4) assumes that an arbitration agreement has been concluded and it provides for the situation where issues arise whether that concluded agreement is or may be in law 'null and void, inoperative, or incapable of being performed'. In this context 'null and void' means 'devoid of legal effect'. This is made clear by the decision in 1983 of the United States Court of Appeals for the Third Circuit in Rhone Mediterranee Compagnia v Achille Lauro* [1983] 712 F 2d 50. The court in that case had to determine the construction of identical wording in section 3 of Article II of the 1959 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. On this issue the court said (at 53):
>
> > ... we conclude that the meaning of Article II section 3 which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is *'null and void' only (1)* when it is subject to an internationally recognized defense such as duress, mistake, *fraud* or waiver ... or (2) when it contravenes fundamental policies of the forum state. The 'null and void' language must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate.
>
> Likewise in this context *for an arbitration agreement to be 'inoperative' it must have been concluded but for some legal reason have ceased to have legal effect;* eg by reason of acceptance of a repudiation as in *Downing v Al Tameer Establishment* [2002] EWCA Civ 721 at [26]–[35], [2002] 2 All ER (Comm) 545 at [26]–[35].

[82] Therefore, I am inclined to accept the interpretation given by Justice Lightman in Albon that there must first be a *concluded* arbitration agreement (in that it must exist) before the Court can hold it to be 'inoperative', but for some legal reason have ceased to have legal effect.

...

[94] On the specific issue of the existence of a valid and binding arbitration agreement, the Federal Court in *Press Metal Sarawak* held as follows:

> [43] *The first issue* which *must be determined under* s 10(1) of the 2005 *Act is* whether there *is in existence a valid and binding arbitration agreement or clause* between the parties relating to the subject matter of the claim in question.
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> ...
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> [48] The learned judge *made a finding* that 'even though the placement slip do not expressly contain an arbitration clause, it is not a disputed fact that the placement slip makes reference to the following: renewal of Policy No HW-E0023997-EMB-R002'. The learned judge *concluded that the evidence adduced by the defendant* clearly showed that the above reference related to the policy number of the previous Jerneh Policy and there was an understanding

between the parties that the new policy would be based upon the terms of the expired Jerneh Policy.

[49] *Together with other supporting documentary evidence* in the form of an email from the defendant dated 24 October 2012 which also made reference to the placement slip and the renewal of the Jerneh Policy, and a series of emails between the plaintiff and its authorised broker, BIB Insurance, particularly an email dated 2 October 2012 from BIB Insurance, sent to the defendant, which clearly made reference to the renewal of the previous Jerneh Policy, the learned judge concluded that the expired Jerneh Policy contained an arbitration clause in relation to both the machinery breakdown and the loss of profits sections of the cover, and the said arbitration clause was effectively incorporated in the latter policies by the reference made in the placement slip.

[50] *In light of all those findings*, the learned judge held that 'in my view the intention of the parties was that any disputes would be referred to arbitration as per terms and conditions of the expiring Jerneh Policies and agreement extends to the matters claim in this suit'.

[51] *We agree with the findings of the learned judge on this issue. These are findings of fact based on the evidence adduced before the court.* We find that these findings are consistent with the provisions of s 9 of the 2005 Act, particularly sub-s (5) thereof which clearly provides that a reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement; and the agreement is in writing and the reference is such as to make that clause part of the agreement. We find no reason to disturb them.

[95] It is clear from the above quoted passages from *Press Metal Sarawak* which emphasis I added, that the Federal Court approved the learned High Court's *evaluation and findings of fact based on evidence adduced before the court*. It is therefore safe to say that such evaluation of evidence is *not* consistent with the Prima Facie Test.

[96] To further emphasise this point, the Federal Court in Press Metal Sarawak did not speak of a superficial or cursory method of evaluation evidence or otherwise a non-detailed method of examination the evidence in an application under s 10(1) of the AA 2005 where the existence of an arbitration agreement is in issue. On the contrary, it seems to supports a more thorough approach in assessing the evidence.

[23] As the result, the learned judicial commissioner also granted the anti-arbitration injunction applications in the exercise of his discretion based, inter alia, on the case of *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd* [2019] 5 MLJ 1 and *Claxton Engineeering Services Ltd v TXM Olaj-es Gazkutato Kft (No 2)* [2011] EWHC 345 (Comm).

[24] In this regard, he basically found on balance of justice that the anti-arbitration injunction applications did not cause injustice to MIFE. Moreover, he took the view that the legal and equitable rights of LCP and LGS

have been infringed or threatened by the continuation of the arbitration as well as that the continuation of the arbitration would be vexatious, oppressive and unconscionable.

FINDINGS OF THIS COURT

[25] Basically the parties re-hashed their respective contentions made in the High Court and we noted that MIFE in its appeal primarily urged us to adopt the prima facie approach set out in *Malini Ventura*; hence embark on the third option in the guidelines prescribed in *Peter Albon*.

[26] We are of the view that the decisions of the learned judicial commissioner on the stay application as well as on the anti-arbitration injunction applications primarily involved the exercise of discretion.

[27] In this respect, we are mindful of the following dicta of Abdoolcader J (later FCJ) in *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150:

> There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. *An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion* (*Charles Osenton & Co v Johnston* [1942] AC 130 (at p 148), 148 per Lord Wright). The Privy Council held in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v Bartlam* [1937] AC 473.
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> The House of Lords, approving the decision of the English Court of Appeal in *Ward v James* [1966] 1 QB 273, held to the same effect in Birkett [1978] AC 297 (at pp 317, 326, 317, 326). For good measure, we would refer to the felicitous expression of Goulding J, in Re Reed (a debtor) [1979] 2 All ER 22, 25 on this point (at p 25):
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> > *... the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.*' (Emphasis added.)

This has recently been adopted and re-emphasised by this court in *Iskandar*

Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2019] MLJU 429; [2019] 7 CLJ 143.

[28] In determining these appeals before us, it is apposite that we reproduce s 10 of the AA which concern the stay application:

10 Arbitration agreement and substantive claim before court

(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

(2A) Where admiralty proceedings are stayed pursuant to subsection (1), the court granting the stay may, if in the proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest —

(a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute; or

(b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

(2B) Subject to any rules of court and to any necessary modifications, the same law and practice shall apply in relation to property retained in pursuance of an order under subsection (2A) as would apply if it were held for the purposes of proceedings in the court making the order.

(2C) For the purpose of this section, admiralty proceedings refer to admiralty proceedings under Order 70 of the Rules of the High Court 1980 *and proceedings commenced pursuant to paragraph 24(b) of the Courts of Judicature Act 1964.*

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

(4) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia.

[29] Additionally, it is apt that we reproduce s 18 of the AA too:

18 Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

(2) For the purposes of subsection (1) —

(a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and

(b) a decision by the arbitral tribunal that the agreement is null and void shall not ipso jure entail the invalidity of the arbitration clause.

(3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.

(4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator.

(5) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.

(7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.

(8) Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within thirty days after having received notice of that ruling appeal to the High Court to decide the matter.

(9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

(10) No appeal shall lie against the decision of the High Court under subsection (8).

[30] We have therefore accordingly reviewed the interplay of s 10(1) and (4) and s 18(1) and (2) of the AA in the light of the rival arguments advanced by the parties on the available options particularly whether it should be the second option or the third option in the guidelines prescribed in *Peter Albon* to determine if there was a concluded arbitration agreement here which is not null and void, inoperative or incapable of being performed.

[31] The pivotal issue in contention is that the impugned supply contracts which contained the arbitration agreement have been obtained through forgery; probably by PR on sheer logic.

[32] We have noted in *Peter Albon* (at para [18] therein) that the arbitration agreement would be null and void; hence invalid if the concluded arbitration agreement has been procured by fraud. In our view, forgery is a species of fraud; see s 463 of the Penal Code for example.

[33] Based on the available options in the guidelines prescribed in Peter Albon, we acknowledge that the determination on whether there is a concluded arbitration agreement that is not null and void cannot be meaningfully made based on the existing affidavit evidence before us to invoke the first option or fourth option. There is the necessity for further investigation here. This may be made by the High Court pursuant to the second option premised upon s 10(1) of the AA or by the arbitral tribunal pursuant to the third option premised upon s 18(1) and (2) of the AA. In other words, both the High Court and the arbitral tribunal are forums that have jurisdiction and power to investigate and conclude on the validity of the arbitration agreement.

[34] In such instance of concurrent jurisdiction and power, we proffer a flexible approach that the appropriate forum to investigate and determine the validity of the arbitration agreement must be the forum that is on balance more just and convenient having regard to the facts and circumstances in issue.

[35] It is plain and obvious to us that the investigation ought to be carried out in Malaysia because of the specific fact that the impugned supply contracts emanated from Malaysia probably through the participation of PR which is based in Malaysia. If the investigation is undertaken by the High Court, there is the availability of the power to compel PR's attendance via subpoena which is unavailable to the Hong Kong-based arbitration. In this sense, the *Malini Ventura* case is distinguishable on its special facts particularly in that the antecedent transaction was all done in Singapore.

[36] We are mindful that the investigation by the High Court is a limited inquiry into the validity of the arbitration agreement only and not the entire determination of MIFE's unpaid payment claims.

[37] In the premises, we do not find that the learned judicial commissioner made a serious error in his exercise of discretion in refusing the stay application where no court confronted with the facts and relevant factors before it would have decided differently.

[38] We find in consequence that it is also necessary to preserve the status quo pending the investigation that has to be undertaken by the High Court; thus, the anti-arbitration injunctions against the arbitration are warranted. Moreover, we do not see any injustice that has been caused to MIFE by being injuncted from proceeding with the arbitration pending the undertaking of the investigation by the High Court. Any delay in re-commencing the arbitration can be compensable in interests and/or costs.

[39] Again in the premises, we do not find that the learned judicial commissioner made a serious error in his exercise of discretion in granting the

anti-arbitration injunction applications where no court confronted with the facts and relevant factors before it would have decided differently.

CONCLUSION

[40] For the foregoing reasons, we find that the appeals are unmeritorious and are thus dismissed as so ordered.

Appeals dismissed with costs of RM5,000 for each of the appeals subject to allocator; proceedings remitted to the High Court to be heard before another judge.

Reported by Dzulqarnain Ab Fatar